**[1998] QCA 318**

**COURT OF APPEAL**

**McPHERSON JA**
**AMBROSE J**
**BYRNE J**

**CA No 234 of 1998**

**THE QUEEN**

**v.**

**S** **Applicant**

**BRISBANE**

**DATE 27/08/98**

**JUDGMENT**

**McPHERSON JA:** The applicant seeks leave to appeal against sentences imposed on him on 2 June 1998 in the District Court at Beenleigh. There were two indictments.

He was charged on the first indictment and pleaded guilty to one count of maintaining a sexual relationship with his step-daughter K, accompanied by a circumstance of aggravation; three counts of indecent assault with circumstances of aggravation; one count of indecent treatment of a child under 16 years with circumstances of aggravation; one of wilfully exposing a child under 16 to an indecent act while she was in his care; one count of attempted rape and one of attempted indecent assault.

Under the second indictment, which involved his natural daughter J, he was charged with another count of indecent assault with circumstances of aggravation and a further count of indecent treatment of a child under 16 years with circumstances of aggravation.

K was some 12 or 13 years old at the time of the first offence in the first indictment. J was 11 years old or thereabouts. The applicant pleaded guilty to these charges, but did so only after the trial commenced. He was sentenced on the first indictment to seven years imprisonment for the offence of maintaining a sexual relationship with circumstances of aggravation, and three years for the remaining counts on that indictment, all sentences to be served concurrently.

On the second indictment, he was sentenced to 18 months imprisonment for the two offences there, and that term of imprisonment was ordered to be served cumulatively upon the sentences imposed in respect of the first indictment. Effectively, therefore, he was sentenced to a cumulative term of eight and a half years imprisonment of which seven years was attributable to the first indictment.

The offences charged on the first indictment occurred between 1 September 1995 and 1 August 1997. With respect to that complainant, who is his step-daughter, the applicant engaged in activities such as putting his finger into her vagina, licking her breasts, exposing himself to her, forcing her to masturbate him and attempting to kiss her. As a result of some of these actions on his part she suffered vaginal pain for some days after some of the incidents.

The charge of attempted rape occurred during one day of the school holidays. The complainant was lying on her bed when the applicant came into her room, put his hand over her mouth and his finger in her vagina. As she struggled, he tried unsuccessful to put his penis in her vagina. He was naked and lying on top of her. She struggled and he eventually desisted after she punched him in the head.

The offence of wilfully exposing a child under 16 to an indecent act while in his care occurred when he performed oral sex on another person in the presence, and in the view of, the complainant.

The complainant, J, against whom the offences in the second indictment were committed was, as I have said, 11 years old and the applicant's natural daughter. She was in a car with the

applicant when he asked if he could touch her down below. Ignoring her refusal, he put his finger in her vagina and then exposed his penis to her and forced her to masturbate him.

The applicant submits that the sentences imposed are manifestly excessive. He submits that the effective eight and a half years sentence with no recommendation for parole did not sufficiently recognise his plea of guilty and his co-operation.

It should be said in respect to the plea of guilty that it was forthcoming only after the jury had been empanelled. There is at least a partial explanation for its lateness in that it is said that his legal representatives were unsure of the applicant's mental condition and his ability to understand and give instructions; and in order to ensure that he was properly able to plead in the way that he did in the end, it was necessary for them to make thorough enquiries before they took the step of advising him so to plead.

The applicant has, it seems, a tendency to abuse alcohol. He has cirrhosis of the liver and is on a disability pension. He has a history of heavy alcohol abuse and it seems there is no doubt that he has only limited intellectual ability.

The applicant, who is 34 years of age, has previous convictions for house-breaking, wilful damage, burglary, permitting himself to be indecently dealt with by a child under 12, breach of probation and obscene language. The learned sentencing judge in this instance referred to the gross breach of trust involved in these offences and the significant psychological impact they were likely to continue to have on the complainants.

The respondent submits that the sentences are appropriate when regard is had to the applicant's previous criminal history of sexual offences on children or, perhaps more accurately, the previous occasion on which he was convicted and sentenced for such an offence, and also when regard is had to the persistent nature of his sexual misconduct on this occasion and that more than one child under his care was involved.

The offences going to make up his prior criminal record are for the most part capable of being regarded as not serious except for his conviction in 1989 when he was sentenced to six

months for burglary; and again in 1992 when he was sentenced to imprisonment for eight months for permitting himself to be indecently dealt with by a female child under 12. It is, I think, pertinent to remark that that child was a girl aged under 12, who was a friend of K.

In addition to the circumstances of aggravation to which I have already referred and the fact that two separate victims were involved, one of them a quite young girl, what goes very heavily against the applicant in this case are, to my mind, four matters in particular.

The first is that in 1992 he was convicted of the sexual offence I have already mentioned, committed with respect to a girl under the age of 12. The sentence of eight months that he was ordered to undergo on that occasion does not appear to have been a sufficient warning to him to desist from activities of this kind again because he went on to commit these offences against these other two unfortunate girls.

The second factor that I think weighs against him is that on one, or maybe two, occasions he plied K with alcohol in order to make her less resistant to his advances. On one occasion, too, he appears to have involved another woman in some way as a party to the offence.

The third factor I think that counts against him heavily is his conviction of the attempted rape. One cannot too seriously condemn that offence, particularly when committed on a girl of K's age who, courageously one might think, fought and punched him off until he finally stopped attempting to carry out the offence.

Attempted rape has, however, always been regarded as a serious offence, and I would think that, although the judge apportioned the sentences on the first indictment in a somewhat different way, the reason for the high sentence of seven years, or one of the reasons for it was the conviction for attempted rape.

That feature of the matter tends, to my mind, to differentiate this from most of the other cases to which we were referred and most of the other cases to which we are often referred in the case of sexual offences like these.

The only factor in the end that one can see as operating in favour of the applicant is his plea of

guilty. It was on that that Mrs Richards placed most reliance in her application for leave to appeal here. Without that plea of guilty, the complainants would have been subjected to the trauma of giving evidence at the trial, and the fact that in the end the applicant saved them from that misfortune is a matter that ought properly to be taken into account in his favour, particularly as all of us have experience of knowing how difficult it is for the prosecution to obtain convictions in some instances in which children have to give evidence against their parents or step-parents in matters of this kind.

The question is to work out what the offences in these cases would have attracted by way of sentence without that plea of guilty.

Having given the matter careful attention, I have come to the conclusion that it would have been possible and justifiable for the judge to have arrived at a sentence of about 10 years imprisonment, and then to have moderated it by reference to the plea of guilty.

I say that in part for the reasons I have already given; that is to say, the fact that the offences charged included the attempted rape; there were two victims; they were in positions of trust; and that devices such as alcohol and so on were used to overcome the resistance of the victim; but most of all, of course, because this accused had already been convicted of an offence of this kind and had served a sentence without its having any salutary impact on him.

It nevertheless did remain for the judge to alleviate the sentence by reference to the plea of guilty; but I think it can fairly be said that he has done so because, if the offences in these two indictments could, as I think, have justified a sentence of as much as 10 years imprisonment, a reduction to eight and a half in recognition of the plea of guilty would have been considered proper in the circumstances.

It must be said that a sentence of 10 years would have been high, and one would not have thought that the judge would have been justified in imposing it if it had not been for the features that I have mentioned, including, particularly, the prior conviction for an offence of this kind and the offence of attempted rape, as well as some of the other aspects of the other offences themselves.

Although, therefore, I have not reached this conclusion without a certain amount of concern and anxiety, I consider that it is not really possible or proper to alter this sentence. Even in view of the fact that there was a plea of guilty, the offences concerned rightly attracted high penalties for the reasons I have mentioned, and the effective sentence of eight and a half years that was imposed seems to me in the end to reflect a recognition on the part of the judge of the value of the plea of guilty made by the applicant at the trial even if at a rather late stage.

In all the circumstances I would be disposed to refuse the application for leave to appeal.

**AMBROSE J:** I agree.

**BYRNE J:** I agree.

**McPHERSON JA:** The order of the Court therefore is that the application for leave to appeal is refused.